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Rights of indigenous peoples

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Note by the Secretary-General

The Secretary-General has the honour to transmit the report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz, submitted in accordance with Human Rights Council resolution 27/13.

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Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples

Summary

The present report is submitted to the General Assembly by the Special Rapporteur on the rights of indigenous peoples pursuant to her mandate under Human Rights Council resolution 27/13. In the report, the Special Rapporteur provides a summary of her activities since her last report to the General Assembly. She dedicates the thematic section of the present report to an analysis of international investment agreements and investment clauses of free trade regimes and their impacts on the rights of indigenous peoples. She views the present report as the starting point for that issue, which she intends to be of continuing importance throughout the course of her mandate.

As a starting point for her ongoing work on international investment and free trade regimes, the report discusses a number of areas of concern, relating both to direct violations of the rights of indigenous peoples and the systemic impact of those regimes on their lives and communities.

The Special Rapporteur contends that investment clauses of free trade agreements and bilateral and multilateral investment treaties, as they are currently conceptualized and implemented, have actual and potential negative impacts on indigenous peoples' rights, in particular on their rights to self-determination; lands, territories and resources; participation; and free, prior and informed consent. That is not to suggest that investments are inherently destructive. Future studies will focus on how investment agreements can be equally beneficial for indigenous peoples and investors.

The present report highlights her analysis of the unjust elements of the prevailing system of global economic and financial governance and the constriction of the protective capacity of States and local governance systems. It discusses how indigenous peoples, as some of the most marginalized in the world, bear a disproportionate burden of a system that contains systemic imbalances between the enforcement of corporate investors' rights and human rights. The report concludes that both a more thorough review of implications of international investment and free trade agreements and deeper policy and systemic reforms are needed to ensure the respect, protection and fulfilment of indigenous peoples' rights.

I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur on the rights of indigenous peoples pursuant to her mandate under Council resolutions 15/14 and 24/9. In the report, the Special Rapporteur provides both a summary of her activities since her previous report to the Assembly (A/69/267) and a thematic analysis of international investment and free trade regimes and their impact on the rights of indigenous peoples.

2. The Special Rapporteur acknowledges with gratitude the assistance provided by the Office of the United Nations High Commissioner for Human Rights (OHCHR). She also expresses thanks to the many indigenous peoples, States, United Nations bodies and agencies and non-governmental organizations that cooperated with her over the past year in the implementation of her mandate.

II. Activities of the Special Rapporteur

A. Participation in international and national conferences and dialogues

3. As part of the fulfilment of her mandate, the Special Rapporteur has participated in a number of international and national dialogues and conferences, for example:

(a) The Special Rapporteur participated in the twentieth session of the Conference of Parties of the United Nations Framework Convention on Climate Change, held in Lima in December 2014, where she took part in the efforts to get human rights, particularly indigenous peoples rights, in the Lima Conference of the Parties' decisions. She held meetings with the Vice-Minister for Intercultural Affairs of Peru and several representatives of indigenous peoples from Peru and other countries;

(b) The Special Rapporteur coordinated closely with the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples, including reporting at the plenary sessions and holding parallel meetings with indigenous peoples and organizations during those sessions. While in Geneva and New York she also held direct dialogues with various Permanent Representatives to the United Nations of 10 Governments from Latin America, North America and the Pacific;

(c) During the fourteenth session of the Permanent Forum on Indigenous Peoples, held in April and May 2015, the Special Rapporteur shared her views on indigenous peoples' right to self-determined development and related economic, social and cultural rights and how they relate to the post-2015 development agenda;

(d) In January 2015, she participated in the international expert group meeting on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples. In February 2015 she did the same at the expert group meeting on cultural heritage and indigenous peoples' rights of the Expert Mechanism on the Rights of Indigenous Peoples;

(e) The Special Rapporteur was a panellist on the Human Rights Council high-level panel on human rights and climate change in March 2015;

(f) In April 2015, she took part in the World Bank Global Dialogue with indigenous peoples, where she made opening remarks and held meetings jointly with indigenous leaders and the president, executive directors and senior management of the World Bank;

(g) In July 2015, she delivered the keynote speech at the first session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights;

(h) In September 2015, she took part in the World Conference on Indigenous Peoples and spoke at a panel addressing coherence among the United Nations bodies, programmes, agencies and funds in relation to indigenous peoples' issues.

B. Country visits

4. Between 20 and 28 November 2014, the Special Rapporteur visited Paraguay. In her end-of-mission statement[1] she noted that the country had ratified all the core international and regional human rights standards, but observed a number of issues related to the violations of the rights of indigenous peoples. She observed that the foremost concern of indigenous peoples remains the security of their rights to lands, territories and resources. She discussed how Paraguay has experienced an exceptional rate of economic growth but how that had come at the expense of large-scale environmental destruction and some violations of indigenous peoples' rights and has not led to significant reductions in the poverty levels of indigenous peoples. She also commented on the lack of social services available to indigenous peoples as part the absence of the State within some indigenous communities, as well as significant barriers faced by indigenous peoples when seeking access to justice.

C. Report on the rights of indigenous women and girls

5. The Special Rapporteur reported to the thirtieth session of the Human Rights Council. Her thematic report (A/HRC/30/41) was on the rights of indigenous women and girls, where she highlighted how they suffer from a complex spectrum of mutually reinforcing and interconnected violations of their collective political, civil, and economic, social and cultural rights. Collectively, those rights violations constitute a form of structural violence against indigenous women and girls, which reinforces other forms of violence they commonly experience. She recognized the slight increase of attention to the rights of indigenous women and girls within some United Nations agencies and mechanisms and asserted that both a paradigm shift and a multidimensional approach is needed to improve the situation of women and girls. In the report, the Special Rapporteur made a series of recommendations to both Member States and United Nations organizations.

[1] Available from ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID= 15361&LangID=E.

III. International investment and free trade agreements

A. Background

6. The increase in foreign investment related to indigenous peoples' lands, waters and the extraction of natural resources such as minerals and metals, oil, gas and timber, among others, continues to be a matter of grave concern to the Special Rapporteur. It has compelled her to look more deeply into international investment regimes and how they interact with the respect or violation of the human rights of indigenous peoples. International investment treaties or agreements are instruments that primarily provide legal protection to foreign investors in relation to their investments in host States. Indeed, trade and financial liberalization have been central to many developing countries' economic development strategies and can create economic opportunities and growth. However, their impact on the human rights of citizens within countries hosting investment projects cannot be assumed to be exclusively or even predominantly positive.

7. The Special Rapporteur has become increasingly concerned about the actual and potential detrimental impacts of international investment and free trade agreements on the rights of indigenous peoples. While the present report aims to provide a general assessment of the key impact that those agreements have on indigenous peoples and the implementation of their rights under the United Nations Declaration on the Rights of Indigenous Peoples, she intends to dedicate ongoing attention to the subject throughout the remainder of her mandate. The following report will broadly frame the Special Rapporteur's concerns in relation to international investment agreements and treaties, and investment protection chapters of multilateral and regional free trade agreements, and set the framework for her ongoing work in the area. In that regard, the Special Rapporteur plans to send questionnaires to Member States and civil society organizations and organize a series of regional consultations to gain further insight into the issue.

8. In the development of the present report and her ongoing work in the area, the Special Rapporteur recognizes the work of other special procedures mandate-holders and United Nations mechanisms. The Special Rapporteur has consulted the report of the Independent Expert on the promotion of a democratic and equitable international order to the thirtieth session of the Human Rights Council (A/HRC/30/44) on the adverse human rights impacts of international investment agreements, bilateral investment treaties and multilateral free trade agreements on the international order. She is also aware of the upcoming report produced by the Independent Expert for the seventieth session of the General Assembly on the human rights implications of State-investor dispute settlement mechanisms.

9. The Special Rapporteur also consulted the report of the Special Rapporteur on the right to food to the Human Rights Council (A/HRC/19/59/Add.5), which provides guiding principles for Member States on ways to ensure that the trade and investment agreements they conclude are consistent with their obligations under international human rights instruments; and the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the sixty-ninth session of the General Assembly (A/69/299), which includes analysis of the impact of investment agreements on the right to

health. In addition, in 2015, 10 mandate holders expressed public concern about the impact of investment and free trade agreements on human rights.[2]

B. Overview of international investment and free trade agreements

10. International investment tends to be managed through treaty-based provisions within international law. There are a number of different mechanisms, known collectively as international investment agreements. International investment agreements are designed to protect foreign investors and their interests within States hosting investment projects. The three main types are:

(a) Bilateral investment treaties, which are signed between two States and focus on investment;

(b) Regional investment treaties that are signed between multiple countries within a region and also focus on investment;

(c) Provisions within multilateral and plurilateral trade and investment agreements which contain clauses on both investment and free trade, such as the North American Free Trade Agreement, the General Agreement on Trade in Services and the Energy Charter Treaty.

11. Those legal mechanisms, which constitute a primary source of public international law, first came into force in the late 1960s, before growing exponentially in the 1990s. At the end of 2014, there were 2,923 bilateral investment treaties and 345 other investment agreements in force, making the total number of international investment agreements 3,268.[3] The volume of bilateral investment treaties is decreasing, but the number of international investment agreements overall remains fairly stable owing to recent trends in investment provisions, equivalent to those commonly found within bilateral investment treaties, increasingly being included within broader free trade agreements. For example, the United States of America is concluding negotiations with countries from Asia for the Trans-Pacific Partnership Agreement, which includes investment features commonly found in bilateral investment treaties. The inclusion of investment management provisions within free trade agreements demonstrates the close links and shared neoliberal intellectual foundations of international investment and free trade.

12. The majority of investment treaties are negotiated between developing and developed countries. For example, 75 per cent of bilateral investment treaties are estimated to be between developing and developed countries.[4] However, the proportion of South-South investment agreements is growing. Developing countries enter into the agreements to open up their markets to foreign investors because of the expectation of jobs, investment and growth in gross domestic product (GDP).

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[2] Available from ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID= 16031&LangID=E.

[3] United Nations Conference on Trade and Development (UNCTAD), "IIA issues note: recent trends in IIAs and ISDs" IIA issues notes, No. 1 (February 2015). Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

[4] Howard Mann, "International investment agreements, business and human rights: key issues and opportunities", prepared by the International Institute for Sustainable Development for John Ruggie, Special Representative of the Secretary-General on the issue of human rights, transnational corporations and other business enterprises, February 2008.

Such expectations are linked to dominant development paradigms, which identify foreign direct investment (FDI) and trade liberalization as strong drivers for GDP growth.

13. International investment agreements seek to provide substantive rights to investors that protect against expropriatory, unfair and discriminatory conduct by States hosting investment projects. While there is some variety among the agreements, international investment agreements often take a fairly standard format and many countries have model bilateral investment treaties that they use as a basis for negotiating such agreements. The standard terms within investment and free trade agreements include provisions relating to stabilization, expropriation, fair and equitable treatment and non-discriminatory treatment:

(a) Stabilization provisions are "choice of law" clauses that commonly stipulate which country's laws will govern the parameters of investment projects. The provisions also commonly including language indicating that any future changes in such laws cannot be retroactively applied in a way that disadvantages the investor;

(b) Expropriation clauses seek to limit the impact of Government agencies taking property for public purposes from foreign investment projects. Investor agreements tend to specify that any expropriation undertaken relating to investment projects must be in the public interest, non-discriminatory and compensated for at a market rate;

(c) Fair and equitable treatment clauses are a core part of investment agreements. They are broad provisions that have been interpreted to compel States to act "consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an even-handed manner, to ensure due process in decision-making and respect investors' legitimate expectations".[5] Fair and equal treatment clauses have, for example, been used to challenge taxation increases and Government attempts to regulate harmful products such as tobacco (see A/HRC30/44, paras. 25-27);

(d) Non-discriminatory treatment clauses specify that foreign investors from the home country should be guaranteed treatment that is equal to nationals from the host State and other third-party nationals.

14. Alongside the investor-State dispute settlement mechanisms, discussed below, the provisions collectively convey a strong set of rights to investors, which have significant and varied implications for indigenous rights and also affect the related protective capacities of States.

C. Investor-State dispute settlements

15. One significant feature of investment and free trade agreements are provisions which provide for the establishment of investor-State dispute settlement mechanisms. Those allow investors to challenge States for perceived violations of their rights under international investment agreements within binding arbitration mechanisms. There is a range of arbitral forums, each with their own rules,

[5] See *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (United Nations publication, Sales No. E.11.II.D.15).

available to investors, including the International Centre for Settlement of Investment Disputes, the United Nations Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce and the International Chamber of Commerce.

16. Investors have direct access to such mechanisms with regard to any dispute that may arise within the context of international investment agreements, and, under provisions in international investment agreements, are not obligated to exhaust domestic remedies beforehand, thereby eliminating any form of judicial review. The non-judicial tribunals can award compensation to investors if the State is judged to have violated clauses in the investment treaty. There are no limitations on the financial awards that can be made. The United Nations Conference on Trade and Development (UNCTAD) reported that in 2014 a State was compelled to pay $50 billion to a corporation relating to three closely linked cases.[3] Such decisions cannot be appealed and are strictly binding upon States parties. Retroactive compound interest can be charged to States, at commercial rates, from the date of the measure that is being challenged within an investor-State dispute settlement case. It is reported that in one instance, a State party was instructed to pay $589 million in interest as part of a billion dollar award to a corporation.[6]

17. The majority of investor-State dispute settlement proceedings are bought against developing countries. Some 78 per cent of the known 608 investor-State dispute settlement claims bought against 101 countries have been against less developed countries. However, recent trends have shown that a growing proportion of investor-State dispute settlement cases are being brought against developed countries. In 2014, 40 per cent of new cases were against such States.[3] Cases against developed countries are predominantly brought by investors in other economically advanced countries, such as those in North America and the European Union.[7] As at the end of 2014, the most common States to be challenged in investor-State dispute settlement cases were Argentina, the Bolivarian Republic of Venezuela, the Czech Republic, Egypt, Canada, Mexico, Ecuador, India, Ukraine, Poland and the United States. While there is a mixture of developed and developing countries in that list, tribunal proceedings do not affect them equally. For example, the United States has used its legal and financial resources to fight investor-State dispute settlement cases, and it has never lost and been required to award compensation to an investor.[8]

18. Investors who brought investor-State dispute settlement cases in 2014 were predominantly from developed countries. The most common home States were the United States, the Netherlands, the United Kingdom of Great Britain and Northern Ireland, Germany, France, Canada, Italy, Spain, Switzerland, Turkey, Belgium and Austria. That follows long-term trends that show 80 per cent of claims are brought by investors from highly developed countries within North America and the European Union.[3]

19. The majority of recent investor-State dispute settlement proceedings have been brought under bilateral investment treaties; 30 of the known 42 cases in 2014 were

[6] Public Citizen, "Memorandum". Available from citizen.org/documents/oxy-v-ecuador-memo.pdf.

[7] UNCTAD, "IIA issues note: investor-State dispute settlement: an information note on the United States and the European Union", IIA issues notes, No. 2 (June 2014). Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d4_en.pdf.

[8] Congressional Research Service, "International investment agreements (IIAs): frequently asked questions", 15 May 2015. Available from http://fas.org/sgp/crs/misc/R44015.pdf.

brought under such treaties. Overall, however, the majority of investor-State dispute settlement cases have been brought under free trade agreements, with the North American Free Trade Agreement and the Energy Charter Treaty as the most frequently invoked standards.[3] Investors sometimes bring claims under both free trade agreements and bilateral investment treaties in situations where both are in place between the host and home States. In 2014, the most challenged State practices under investor-State dispute settlement proceedings were cancellations or alleged violations of contracts or concessions and revocations or denials of licences or permits. Other practices challenged include legislative reform, discrimination against foreign investors, water tariff regulation, measures relating to taxation and environmental issues.[3]

IV. International investment, free trade and the human rights of indigenous peoples

20. The impact of free trade and international investment agreements on human rights is broadly recognized as including issues such as land rights, environmental degradation, poverty, the State's regulatory and protective capacity, democratic deficit and challenges to the rule of law in relation to the development and enforcement of such agreements and the Government's ability to provide services such as health and water. Those issues have been recognized within the human rights and business agenda. The issue was discussed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and is included within principle 9 of the Guiding Principles on Business and Human Rights. The principle articulates that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts".

21. The following section will look more specifically at both direct and systemic effects of investment and free trade regimes on the human rights of indigenous peoples. The two categories are deeply interrelated and mutually reinforcing, but it is valuable to look at them separately as it provides insight into the multilayered ways in which free trade and investment agreements and their enforcement, as described above, affect the human rights of indigenous peoples. Data about the impacts are limited owing to the complex, diffuse and opaque nature of such regimes. Therefore discussion of the issues of concern will summarize both available information and areas for further exploration by the Special Rapporteur during the implementation of her mandate.

A. Direct impacts on the rights of indigenous peoples

Rights to lands, territories and resources

22. A strong link to lands, territories and natural resources is a characteristic commonly associated with indigenous peoples. As outlined in, inter alia, articles 8, 25, 26, 29 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples, indigenous peoples have the right to the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired, as well as the right to own, use, develop and control such resources. Article 1 of the

International Covenant on Civil and Political Rights, which establishes collective and individual rights to own property, complements the provisions within the Declaration.

23. Both non-discriminatory and expropriation clauses within investment and free trade agreements have significant potential to undermine the protection of indigenous peoples' land rights and the strongly associated cultural rights. Non-discriminatory clauses, as discussed above, entitle foreign investors to equal treatment to that afforded to nationals and other third parties. In practice, it means that if the rights of indigenous peoples are not explicitly included as exceptions to such provisions, then any special protections of their lands, either under customary law or even through specific indigenous land rights legislation, could be rendered obsolete in the context of investments.

24. Expropriation clauses within investment agreements also have the potential to be a significant barrier to indigenous land claims. If, in order to implement the Declaration and other human rights standards, host Governments with international investment agreements in place take positive measures to redistribute customary lands taken by foreign investors back to indigenous peoples, they could be required to provide compensation at commercial market rates. Investor-State dispute settlement tribunals have enforced that need for compensation at a market rate, even when land expropriation was for a legitimate public purpose or to redress an unjust appropriation of indigenous peoples' lands and territories.[9]

25. Moreover, the cost of reclaiming land in order to fulfil the rights of indigenous peoples may also be a barrier. States have historically faced challenges in finding the resources to pay for indigenous land. The application of the expropriation clauses within international investment agreements, without the mitigation of compensation, can only significantly increase those difficulties. Many governments, including local and indigenous governments, may simply not be able to afford the costs of reclaiming indigenous lands, even where they are protected, despite the provisions within the Declaration and other human rights treaties.

26. The complex tensions between the land and resource rights of indigenous peoples and the provisions of international investment agreements are exemplified by a number of cases, as discussed below.

27. In Ecuador, there has been a very long and complex legal dispute over environmental damage to indigenous land. Texaco, which became a subsidiary of Chevron in 2001, was accused of severe pollution of the rainforest and rivers between 1964 and 1992. Subsequently, two groups of indigenous peoples launched class action suits. In 2011, a judge ruled that Texaco/Chevron should pay $8.6 billion in damages or $18.6 billion if they failed to publically apologize. Texaco/Chevron has claimed the judgements are based on bribery and fraud and appealed the ruling in a number of Ecuadorian courts. During the ongoing legal processes, the damages increased to $18 billion. The Supreme Court of Ecuador upheld the judgement in 2012 but halved the increased damages to $9.51 billion.

[9] Margaret B. Devaney, "Remedies in investor-State arbitration: a public interest perspective", *Investment Treaty News* of the International Institute for Sustainable Development, vol. 3, No. 3 (March 2013). Available from iisd.org/sites/default/files/pdf/2013/iisd_itn_march_2013_en.pdf.

Texaco/Chevron has made several attempts to pursue damages under the bilateral agreement between the United States and Ecuador. Arbitration is ongoing.[10]

28. In 2007, the Government of Peru authorized a Canadian mining company, Bear Creek Mining Corporation, to operate the Santa Ana silver mine. Indigenous groups were concerned about the impact on Lake Titicaca and held a series of strikes and blockades. Following that action, and the deaths of six protestors when police fired on mostly indigenous protesters opposing the project, the Government was forced to repeal the mining company's authorization in 2011. At the same time, the Government gave local indigenous communities the power to approve or deny any mining or drilling operations in the area. The investor is now suing the Government of Peru under the investment chapter of the Canada-Peru free trade agreement and appears likely to claim expropriation of its investment. There are indications that the Government may allow the mine to restart to avoid a costly legal battle.[11]

29. Local indigenous peoples in the Plurinational State of Bolivia opposed a mining project in the area of the Mallku Khota because of its impact on sacred lagoons. Following strong social protest and recognition by the Government that the project violated a number of the provisions of the United Nations Declaration on Rights of Indigenous Peoples and the Indigenous and Tribal Peoples Convention (No. 169) of the International Labour Organization (ILO), the Government reversed the investor's concessions. The investor sued under the United Kingdom-Bolivia bilateral investment treaty, alleging a violation of the fair and equal treatment clauses and expropriation, among other provisions. The Government is trying to bring consideration of human rights, including the Declaration, into the investor-State dispute settlement case, including by claiming that the investor violated human rights, including those contained within the Declaration.[12]

30. Given the multitude of mining and petroleum projects, agribusiness investments, special economic zones, tourism developments and infrastructure projects taking place across almost all of the world's continents, often on indigenous lands, whether demarcated or not, conflicts between land rights and investment and free trade agreements are likely to become increasingly common. Indigenous peoples are vulnerable to experiencing a disproportionate burden of such conflicts, not only due to the frequency with which their lands are used for investment-related projects but also as a result of the additional loss of the cultural, non-economic benefits that indigenous people often derive from land.

Free, informed and prior consent

31. The right to free, informed and prior consent is included within the United Nations Declaration on the Rights of Indigenous Peoples and the right to consultation in ILO Convention No. 169. Despite those provisions, only

[10] Business & Human Rights Resource Centre, "Texaco/Chevron lawsuits (re Ecuador)". Available from http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador.

[11] International Centre for Settlement of Investment Disputes. "Bear Creek Mining Corporation v. Republic of Peru, ICSID case No. ARB/14/2". Available from italaw.com/cases/2848; Mitra Taj, "Peru hopes to revive Bear Creek mine, avoid legal battle", 15 August 2014. Available from http://in.reuters.com/article/2014/08/15/peru-bear-creek-minng-santaana-idINL2N0QL00Z 20140815.

[12] Permanent Court of Arbitration, "South American Silver Limited v. Bolivia, UNCITRAL, PCA case No. 2013-15", 2013-2015. Available from italaw.com/cases/2121.

representatives from national Governments negotiate, draft and agree on investment agreements, which are often conducted in strict privacy. The Special Rapporteur is not aware of representatives of indigenous peoples and/or officials from recognized indigenous self-governing structures being invited to participate in the formal negotiation and drafting of investment and free trade agreements that will have direct impacts on them. Given that such agreements are formally binding on all levels of government and that many investment projects have significant impact on indigenous peoples, that situation is, in and of itself, a violation of the rights to free, informed and prior consent, participation, consultation and self-determination.

32. The free, prior and informed consent of indigenous peoples has not been obtained in many projects funded by foreign investors within the framework of international investment agreements. Good faith consultations with indigenous peoples should be completed when undertaking all investment projects that directly affect them, as required by articles 19 and 32, paragraph 2, of the United Nations Declaration on the Rights of Indigenous Peoples and article 6, paragraph 2, of ILO Convention No. 169. The application of those articles to investment and free trade agreements provide opportunities to integrate the needs and perspectives of indigenous peoples into the provisions of the agreements, and prevent future abuses of their human rights. When such opportunities are lost, the chances for conflicts, discontinuation of projects and loss of profits increase.

33. The violations are exacerbated by the fact that there is the potential risk for financial liability for damages awarded against the State party to be passed on to indigenous governments. For example, some national Governments, including Canada and Mexico, have sought to reclaim the costs of damages awarded to corporations through withholding funds from local governments. In Mexico, a municipal government refused to give a permit for a toxic waste dump and the state government declared the area a special ecological zone. The Government of Mexico was subsequently sued by a United States investor under the North American Free Trade Agreement and required to pay $16 million.[13] The Government of Mexico attempted to withhold federal funds from the state-level authorities who had withheld the permit in an effort to force them to accept financial liability for the investor-State dispute settlement award. The state-level authorities challenged that and the Supreme Court of Mexico found that the national Government could not claim the damages back from the state-level authorities. While that case demonstrates that States cannot automatically pass the financial liability of investor-State dispute settlement awards to local authorities, there are other cases in which such agencies have had to pay damages relating to investment and free trade agreements. While the Special Rapporteur is not aware of any States passing on financial liability to autonomous indigenous governments, it is a potential issue of serious concern in relation to the right to free, informed and prior consent.

34. Violations of the right to free, informed and prior consent also have the potential to contribute to further abuses of the rights of indigenous peoples in the context of international investment and free trade agreements. Application of the principle of free, informed and prior consent to investment and free trade agreements provides an opportunity to integrate the needs and perspectives of indigenous peoples into the provisions of such agreements and investments and

[13] Public Citizen, "NAFTA chapter 11 investor-State cases: lessons for the Central America Free Trade Agreement", *Public Citizen's Global Trade Watch*, No. E9014 (February 2005).

prevent future abuses of their human rights. When such opportunities are lost, the potential preventive effect of respecting the right to free, informed and prior consent remains unfulfilled.

Cultural rights

35. There are a number of ways that the potential effects of investment and free trade agreements could undermine the cultural rights of indigenous peoples. First, the severe implications of investment and free trade agreements on the land and territorial rights of indigenous peoples are compounded by the cultural significance of indigenous lands and territories. As discussed above, links to land and waters are integral to indigenous culture and identity. Therefore, barriers to indigenous land ownership created by international investment agreements and free trade agreements are also an assault on the cultural rights of indigenous peoples. Furthermore, the displacement commonly caused by the loss of land and territory can further undermine the cultural integrity and protections of indigenous communities. Any undermining of indigenous self-governance mechanisms caused by international investment agreements and free trade agreements will also further degrade cultural rights protections.

36. Attempts by indigenous peoples to challenge harmful practices relating to cultural appropriation could also be compromised by the provisions of international investment agreements. One example is a legal challenge brought by indigenous peoples against the Washington Redskins football team regarding the harmful connotations of its name. Since then, six United States federal trademark registrations for the Washington Redskins have been cancelled. The decisions are still subject to appeal, with the sports team claiming large losses following its investment into the trademark. While the legal proceedings are not taking place within investor-State dispute settlement tribunals, that type of trademark cancellation could be challenged under international investment agreements if the trademark belonged to an investor from another country.

Self-determination, poverty and economic and social rights

37. As discussed above, indigenous peoples are not included in the negotiations and drafting of free trade agreements. However, the provisions of those agreements bind their self-governance arrangements and the use of their lands, territories and resources. For example, the United States model bilateral investment treaty is strictly binding on all levels of government, including political subdivisions and other entities that exercise regulatory, administrative or other governmental authority delegated by the national Government. Not having the ability to contribute to the drafting of powerful legal agreements that affect them is a violation of indigenous peoples' right to self-determination, as provided for in article 3 of the United Nations Declaration on the Rights of Indigenous Peoples, and the right to development. Article 32, paragraph 1, of the Declaration says that "indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories".

38. A specific effect of that imbalance in the role of indigenous governments and the denial of the rights to self-determination within the development of international investment agreements could be restrictions on the levying of taxes. A variety of types of taxation, including value added taxes, excise taxes on cigarettes, tax stamps

on cigarettes, corporate income taxes and natural resources taxes, have been challenged under the fair and equal treatment clauses in international investment agreements. A tax imposed only on non-indigenous people (which can include foreign investors) could violate national treatment provisions, for example the provisions within the United States bilateral investment treaty model.

39. The threats to the right to self-determination and self-governance posed by investment and free trade agreements compound long-standing and systemic violations of the rights of indigenous peoples. The violations have included gross and sustained assaults on the cultural integrity of indigenous peoples; the denigration and non-recognition of customary laws and governance systems; a failure to develop frameworks that allow indigenous peoples to exercise their right to development and self-governance; and practices that strip indigenous peoples of autonomy over their lands and natural resources. It is in that sense that international investment agreements are contributing to the perpetuation of colonial and post-colonial power structures that have caused the systematic racism and discrimination towards, and the marginalization and exploitation of, indigenous peoples.

40. Such unequal power relations between indigenous peoples and corporations and States also contribute to endemic levels of poverty among indigenous peoples. Indigenous peoples account for 5 per cent of the world's population, while representing 15 per cent of those living in poverty. As many as 33 per cent of all people living in extreme rural poverty globally are from indigenous communities. Those figures are particularly alarming given the wealth of natural resources that are located within indigenous territories. That degree of poverty is a violation of indigenous peoples' rights to development, as well as of their economic and social rights to an adequate standard of living, housing, food, water, health and education.

41. The violations of indigenous peoples' rights to self-determination and other economic and social rights are strongly linked to indigenous peoples' historical experiences of marginalization, dispossession from and environmental destruction of their ancestral lands and lack of self-determination over development pathways. The impacts of investment and free trade agreements exacerbate all of those factors. In addition, the systemic effects of such agreements, discussed below, also contribute to the causes of poverty and the denial of the right to self-determination among indigenous communities.

42. International investment agreements also have the potential to negatively affect the realization of a number of the economic and social rights of indigenous peoples. The costs borne by States in defending themselves in investor-State dispute settlement cases and in paying awards when defeated can be extremely high. That diverts public resources, which could limit the ability of States to invest in the realization of economic and social rights. International investment agreements can also drive and maintain the practice of privatizing public services and goods, including health care and water. For example, expropriation and fair and equal treatment clauses could make it prohibitively expensive for Governments to revoke private contracts for the provision of public health services. Given the private sector's poor track record of catering to the needs of the most marginalized and vulnerable, demonstrated, for example, by the privatization of water, the impact on the economic and social rights of indigenous peoples is significant.

43. In addition, as discussed in the upcoming report of the Independent Expert on the promotion of a democratic and equitable international order, investor-State

dispute settlement tribunals have been used to challenge measures to improve public health. As cited in the Independent Expert's report, in the Philip Morris (Switzerland) v. Uruguay (2010) case, the multinational tobacco company sued Uruguay under the Switzerland-Uruguay bilateral investment treaty claiming that the Uruguayan anti-smoking legislation devalued its investments. The same company also filed a claim against Australia for its efforts to curb tobacco. Public health issues, such as smoking, are currently increasing in indigenous communities, and the prevalence of such problems can be higher than in non-indigenous populations. Therefore, such investor-State dispute settlement claims have the potential to disproportionally affect indigenous peoples.

B. Systemic effects of investment and free trade regimes

44. International investment and free trade have a number of direct impacts on the human rights of indigenous peoples, as discussed above. While that is highly alarming in itself, it is also important to consider the systemic implications of the collective impact of such agreements and practices at the national and international levels. As some of the most historically marginalized groups within the international system, those systemic impacts strongly affect the human rights of indigenous peoples, who are already often highly vulnerable and bear a disproportionate burden of the overall effects of investment and free trade regimes.

Asymmetry between the State and private actors

45. International investment and free trade agreements confer upon foreign investors and transnational corporations very strong rights and enforcement mechanisms. However, the rules governing the responsibilities of private actors are often contained in so-called "soft" international law. The standards, which include a number of voluntary or non-binding standards or recommendations, fall short of legally binding instruments that allow for achieving balance in the rights and responsibilities of those actors. While investors are therefore able to access a strong and arguably disproportionate form of remedy, States and/or indigenous peoples are often unable to effectively legally challenge corporate practices that severely undermine the realization of human rights. That contributes to a dangerous accumulation of power among international corporate actors, which impedes States' abilities to act as an effective regulator and protector of human and indigenous peoples rights.

Constriction of the policy and legislative space of States

46. Provisions within international investment and free trade agreements can constrict the policy and legislative space in which Governments operate. That has been referred to in literature about international investment agreements as a "chilling effect" whereby the State becomes constrained in its ability to rule in the public interest owing to a wish to avoid sometimes billion-dollar arbitration and settlement costs. As described by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standards of physical and mental health, "international investment agreements and investor-State dispute settlement systems benefit transnational corporations at the cost of States' sovereign functions of legislation and adjudication" (see A/69/299, para. 4).

47. Fair and equal treatment and stabilization clauses have particular potential to constrain the capacity of Governments. For example, the fair and equal treatment requirements in the United States model bilateral investment treaty have been interpreted by some investment tribunals as paralyzing new laws and regulations. Arbitration judgements have upheld that new laws or regulations cannot be enforced if they are adverse to the foreign investor. Fair and equal treatment clauses have also been a very successful way for investors to sue Governments in disputes under trade and/or investment treaties. A high proportion of cases won by investors have invoked fair and equal treatment clauses. Some sources estimate that 81 per cent of cases won by investors cite fair and equal treatment violations.[14]

48. Concerns about that constriction of the policy and legislative space of Governments have a further direct impact on indigenous communities. The "chilling effect" of investment and free trade agreements could reduce the often already-low political will of States to take actions to fully implement the rights of indigenous peoples. For example, in 2010 in Guatemala, the Government suspended operations at the Marlin mine following protests from indigenous peoples and recommendations by the Inter-American Commission on Human Rights and ILO. However, press reports suggest that Government documents obtained through the freedom of information policy of Guatemala revealed that the State's fears that closing the mine down permanently could give rise to an investor-State dispute settlement case under its United States free trade agreement investment chapter played a role in allowing the mine to stay open.[15]

49. Concerns about the "chilling effect" have been expressed in the context of the new Trans-Pacific Partnership agreement between the United States, Canada and several Asia-Pacific countries. The Waitangi Tribunal is a body that was set up in 1975 in New Zealand to investigate grievances of the Maori against the Government of New Zealand. The tribunal established an urgent inquiry into the Government's actions in relation to negotiating the Trans-Pacific Partnership. A law professor asked to give evidence on the inquiry noted that the imposition of new conditions could have a negative impact on initiatives to protect indigenous rights. Potential scenarios she cited as breaching fair and equal treatment clauses in the Partnership could even include efforts to gain the prior consent of a local tribe before drilling, and the decision of a local board to refuse to issue a land-use licence after hearing evidence of Maori concerns.[16]

Loss of public funds

50. The "chilling effect" could be exacerbated by the practical impact of the loss of public funds during investor-State dispute settlement hearings and the costs of Governments defending themselves within tribunals. As described above, some tribunal awards can be valued at billions of dollars, and there are inevitable legal costs associated with fighting investor-State dispute settlement claims. Awards are binding and ultimately have to be paid with funds from taxpayers. The loss of public

[14] Public Citizen, "Memorandum", 5 September 2012. Available from citizen.org/documents/MST-Memo.pdf.

[15] Claire Provost and Matt Kennard, "The obscure legal system that lets corporations sue countries", *The Guardian*, 10 June 2015.

[16] New Zealand Ministry of Justice, "Affidavit of Professor Elizabeth Jane Kelsey", June 2015. Available from https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_92914254/Wai%202522%2C%20A0001.pdf.

funds to private actors on a large scale diminishes the amount of public funding available to broadly promote the public good, and human and indigenous rights more specifically.

51. The injustice of that is accentuated by the fact, discussed above, that historically the majority of countries who have been sued under investor-State dispute settlements are developing countries. As many indigenous peoples live in developing countries and are among the most marginalized within those States, they are highly vulnerable to the effects of the loss of public funds. That vulnerability is compounded by the specific risk, discussed above, of autonomous indigenous governments losing funding in the context of national Governments trying to recoup resources lost in investor-State dispute settlement hearings through withholding funding to local authorities, which can include tribal governments or other indigenous governing bodies.

Democratic deficit and weakened rule of law

52. The processes governing international investment and free trade agreements can be at odds with a human rights approach in many ways.

53. There is a lack of transparency, social dialogue and legislative oversight during the negotiation and drafting process of international investment agreements. Indigenous peoples and formal representatives are not commonly, if ever, included in negotiation and drafting processes despite the fact that the resulting agreements are legally binding upon their jurisdictions.

54. Judicial oversight in relation to international investment agreements is also extremely lacking, thereby undermining the rule of law. As discussed above, investors have direct access to investor-State dispute settlement mechanisms and do not have to exhaust national remedies first; therefore, judicial review of international investment agreements is completely circumvented. The absence of any judicial oversight raises many procedural concerns relating to how investor-State dispute settlements are implemented, including the lack of an appeals process, the diffuse nature of proceedings owing to the lack of any form of coordination and oversight body, the opacity of proceedings and the lack of comprehensive and publically available information about all rulings. In addition, there are serious concerns about bias and conflict of interest among legal professionals involved in cases. As stated by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, "the dispute settlement is controlled by a small clique of arbitrators and lawyers, and the same person may be counsel, arbitrator and adviser to an investor or State at different times. Many arbitrators share close links with business communities and may be inclined towards protecting investors' profits" (see A/69/299, para. 62).

55. Given the public interest and human rights concerns involved in international investment agreements and their enforcement, as well as the huge sums of public money sometimes at stake, the lack of legislative oversight and judicial review is indefensible. Practices that systematically undermine democratic principles and the rule of law progressively limit the ability of States and local authorities to protect human and indigenous rights.

Perpetuation of international power imbalances

56. Investment and free trade regimes can increase inequality between different countries, as imbalances inherent within international power structures can influence the negotiation and enforcement of such mechanisms. As discussed above, international trade and investment regimes more acutely affect developing countries. The majority of international investment agreements are between developing and developed countries; most investor-State dispute settlement cases have been brought against less developed countries, while investors are commonly from developed States.

57. The international investment regime for the protection of the rights of foreign investors has led to many disputes between investors and host States. The decisions and the strong enforcement mechanisms of such regimes can have dire consequences for the realization of human rights generally and indigenous peoples' rights in particular.

58. Questions have also been raised about whether international power structures have influenced the outcome of investor-State dispute settlement tribunals given that developed countries seem to be better able to insulate themselves from their negative impacts. For example, the United States has never lost an investor-State dispute settlement case. It is unclear if that is because developed countries are more able to access resources to defend themselves against cases or if there is a systemic bias favouring the most economically and geopolitically powerful countries.

59. By perpetuating the international power imbalances in the international system, free trade and investment regimes compound the related inequality in the resources available to countries. That lack of resources consequently negatively affects the capacities of less developed countries to protect the most vulnerable, including indigenous peoples.

Exclusive national economic growth

60. International investment and free trade can promote economic growth at the national level through the promotion of FDI and, it is hoped, by raising GDP. However, such economic growth is not often the type that facilitates poverty reduction amongst the most vulnerable citizens, including indigenous peoples. Rather, experience has shown that growth driven solely by trade liberalization, FDI, Government austerity and weak regulation exacerbates inequality and often comes at the cost of large-scale environmental destruction. Those negative secondary effects often undermine a broad range of indigenous peoples' rights, such as land rights, the right to self-determination over development pathways and the rights to health, food and an adequate standard of housing.

V. Key challenges and promising practices

A. Challenges

61. There are a number of closely related and mutually reinforcing challenges to achieving effective reform of international investment and free trade agreements and related improvements in the promotion and protection of indigenous peoples' human rights. Those challenges are discussed in the section below.

Dominance of neoliberalism and focus on extractive activities

62. The liberalization of international trade, the opening of markets to foreign investors and the development of international legal mechanisms have been strongly driven by neoliberal economic theory. Neoliberalism is an economic paradigm that champions the power of market forces and argues that, if left unregulated, markets will deliver global development. Neoliberalism grew in dominance in the latter part of the twentieth century and infiltrated many elements of development policy. Neoliberalism contains many tenets relating to international investment and free trade, including support for trade liberalization, the privatization of public services, a limited regulatory role for States and a link between increased FDI and growth in GDP.

63. Such tenets are consistent with, and therefore legitimize, the provisions of international investment and free trade agreements. Indeed, many leading international financial institutions endorse neoliberalism as a coherent economic theory that, if adhered to, will bring development to all. Yet that unquestioning discourse has obscured the vested interests and important human and indigenous rights implications of international investment and free trade regimes. It has contributed to a model of development that is measured by overall growth figures and gives little weight to whether that leads to a reduction in inequality or alleviates poverty, including among indigenous peoples. Moreover, the widespread and unquestioning endorsement of that economic theory, and its legitimization of free trade and investment agreements, can act as a barrier to cultivating the political will necessary for reform.

64. In parallel to neoliberalism, the development path many Governments have taken and continue to focus on is extractive activity. Extractive activity refers to economic activities focused on removing large quantities of natural resources to be used mainly for export. The natural resources being extracted include minerals, metals, oil and/or gas, water and products from forestry, farming and fishing. Many of the foreign investment projects that directly affect indigenous peoples include extractive activities. The competition between host States to attract foreign investment often leads to a race to the bottom in terms of social and environmental protection.

Lack of coherence within international law

65. International investment and free trade law regimes have been developed as a separate strand of international law from human and indigenous rights standards. Despite the strong public interest issues at stake within international investment agreements and the customary legal status of many human rights principles, there are no formal enforcement mechanisms to ensure that trade and investment agreements uphold human rights. Furthermore, as discussed above, the free trade and investment regime itself is diffuse, complex and opaque. There are many different arbitration mechanisms, rules and agreements, and a general lack of transparency. That undermines the abilities of policymakers and legislators to gain a systemic picture of international investment and free trade regimes and their effect on human and indigenous peoples' rights in order to develop effective options for reform.

Concerns about international competition

66. UNCTAD has identified States' concerns about international competition as a barrier to significant reform to free trade and investment regimes. States that are seen to prioritize the rights of indigenous peoples within their countries could therefore become less attractive for foreign investment, which could cause them to suffer in relation to the benefits that investment projects can bring.[17] Until the playing field is levelled among States, there are strong disincentives to enact significant reform. That highlights the importance of collective action on the issue of free trade and investment agreements and human rights.

B. Promising practices

67. While the Special Rapporteur believes that fundamental reform of the international management of corporate activities is necessary, she is also interested in how current mechanisms can be modified to achieve greater protection of the rights of indigenous groups. UNCTAD has noted that while almost all countries are parties to one or more international investment agreements, many are dissatisfied with the current regime and have concerns relating to the development impact of international investment agreements, the balance of rights and obligations of investors and States, investor-State dispute settlement mechanisms and the systemic complexity of the international investment agreement regime.[3] Those concerns among States present an opportunity for a collective forum on free trade and investment mechanisms. Current promising practices, illustrative examples of which are below, should be built upon to utilize the opportunity for positive change.

Exception clauses to protect the rights of indigenous peoples and promote sustainable development

68. Exception clauses have the potential to protect indigenous peoples from any adverse impacts on their rights in the context of international investment and free trade agreements. For example, indigenous land could be exempted from non-discrimination and expropriation clauses. Available information about exception clauses to protect the rights of indigenous peoples and their effectiveness is very limited and is an area that the Special Rapporteur plans to include in her ongoing engagement with Member States.

69. There have also been examples of clauses included in international investment agreements to promote sustainable development, which could be helpful in promoting the economic and social rights of indigenous peoples. A review by UNCTAD of the 13 international investment agreements concluded in 2014 for which texts are available (7 bilateral investment treaties and 6 other international investment agreements) showed that most of those recent treaties include sustainable development-oriented features. Of the agreements, 11 have general exceptions; for example, for the protection of human, animal or plant life or health, or for the conservation of exhaustible natural resources. Eleven treaties contain a clause that explicitly recognizes that the parties should not reduce health, safety or environmental standards in order to attract investment. Of those 11 treaties, 9 refer

[17] UNCTAD, "IIA issues note: reform of the IIA regime: four paths of action and a way forward", IIA issues notes, No. 3 (June 2014). Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf.

to the protection of health and safety, labour rights, the environment or sustainable development in the preamble.

70. Provisions that aim to more broadly preserve States' regulatory space and/or minimize exposure to investment arbitration supplement those sustainable development features. Provisions include clauses that exclude certain types of assets from the definition of investment, clarify State obligations under international investment agreements to narrow the scope of investor challenges, contain exceptions to transfer-of-funds obligations and more carefully regulate investor-State dispute settlement processes. Each of those types of provisions might be useful mechanisms for protecting the rights of indigenous peoples within the international investment agreement context.

Constitutional reform

71. There are examples of Latin American countries taking legal steps to protect themselves and their citizens from the impacts of international investment agreements. For example, as outlined by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Ecuador amended its Constitution to prohibit entry into instruments that waive its sovereign jurisdiction in the arbitration of disputes with private individuals or corporations. Ecuador, the Plurinational State of Bolivia and the Bolivarian Republic of Venezuela have also withdrawn from the Convention on the Settlement of Disputes between States and Nationals of Other States (see A/69/299, para. 70).

Multilateral efforts to increase transparency

72. There have been some important multilateral efforts recently to increase transparency within international free trade and investment regimes. They include the development and coming into force of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the adoption of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which opened for signature in March of the present year.

VI. Conclusions and recommendations

A. Conclusions

73. **It is clear that international investment and free trade agreements have significant potential to contribute to violations of the rights of indigenous peoples. The threat posed by current regimes lies both in their direct impact on indigenous peoples rights and their contribution to systemic injustices and imbalances, which tend to disproportionally impact indigenous peoples as some of the most globally marginalized. For that reason the Special Rapporteur intends to dedicate ongoing attention to the issue during the fulfilment of the mandate.**

74. **The human and indigenous rights implications of international investment agreements constitute a complex and multifaceted issue that requires sustained and multilateral attention from United Nations Member States in close**

consultation with indigenous peoples and formal representatives. The Special Rapporteur believes that fundamental and systemic reform of the international management of investment and free trade is necessary within the context of broader efforts to address the human rights issues associated with business activities. The situation whereby companies and investors enjoy exceptionally strong rights and remedies while the only mechanisms available to hold them to account for any human and indigenous rights violations are voluntary and/or have a weak standing in international law cannot be allowed to continue. Furthermore, indigenous peoples continue to bear an unequal share of the burden that situation creates, and suffer from a spectrum of severe rights violations within the context of corporate activities and the related management of the globalized economy.

75. The need for wholesale and collective change is not, however, at odds with more immediate and incremental reform. The Special Rapporteur is also interested in the potential of emerging positive practices in relation to international investment agreements and believes that there are immediate steps States can take individually to better protect the rights of indigenous peoples.

76. More States are becoming increasingly dissatisfied with the injustices of free trade and investment regimes. At the same time, key stakeholders are become more fully sensitized to the deeply interrelated imbalances in the enforcement of corporate and human rights. Those trends provide an important opportunity to improve the protection and promotion of human and indigenous rights and to transform the international system of global economic management in such a way that it becomes significantly more just and equitable.

B. Recommendations

77. Concerning the reform of investment and free trade practices, the Special Rapporteur recommends that:

(a) Based on the principle of free, informed and prior consent, as set out in the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169, Member States explore, jointly with affected indigenous peoples, participatory mechanisms that will allow them to take part in or at least comment on the negotiation and drafting of all relevant investment and free trade agreements. That should be included as part of broader efforts to increase the level of social dialogue involved in the negotiation and drafting of such agreements;

(b) In addition to improving the level of social dialogue, the negotiation and drafting of international investment agreements be subject to parliamentary oversight and consultation with all levels of government. All indigenous self-governance structures should be formally included in decision-making relating to international investment agreements;

(c) In accordance with the guiding principles on human rights impact assessments of all trade and investment agreements developed by the Special Rapporteur on the right to food, States undertake robust human rights impact

assessments prior to signing all such treaties. Human rights assessments should routinely include specific consideration of the impact on the collective and individual rights of indigenous peoples developed through direct consultation with indigenous communities;

(d) Member States ensure that gender considerations are adequately integrated into the development of such human rights impact assessments and that its intersecting relationship with other sources of discrimination be analysed so that the specific vulnerability of indigenous women to the effects of investment practices is considered;

(e) Member States involve indigenous representatives, including women, in the negotiating process for all investment and free trade agreements when human rights impact assessments have identified potential issues relating to indigenous peoples;

(f) In consultation with indigenous peoples, Member States consider including exception clauses to protect the rights of indigenous peoples, including to ancestral land, related resources and autonomous government, within all relevant free trade and investment agreements;

(g) Member States ensure that references to the duties of both Governments and businesses to respect human rights, in accordance with the Guiding Principles on Business and Human Rights, are included in all new and renegotiated international investment agreements;

(h) For as long as investor-State dispute settlement tribunals take place, Member States routinely ensure that international human rights law, including all specific provisions on indigenous peoples, are used as a source of law in dispute arbitrations;

(i) Member States publish the results of all arbitration decisions made in investor-State dispute settlement cases, including any specific information on dimensions relating to the rights of indigenous peoples;

(j) Member States include analysis of the impact of investment and free trade agreements on indigenous peoples' rights and legal and policy responses in the development of national action plans on business and human rights and the implementation of the Guiding Principles on Business and Human Rights;

(k) Member States ratify the Convention on Transparency in Treaty-based Investor-State Arbitration, which opened for signature in March;

(l) Member States invest in targeted monitoring, research, and evaluation that develops understanding of the impact of international investment agreements on indigenous peoples and prepare reports on the effectiveness of policy and legal interventions to mitigate that impact.

78. Concerning deeper systemic reform, the Special Rapporteur recommends that Member States:

(a) Act collectively to consider ways to achieve better balance between investor and corporate rights and the human rights of all citizens within investment and free trade regimes;

(b) Participate actively in the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, established by the Human Rights Council in its resolution 29/6, to elaborate on a legally binding instrument and develop ways to strengthen legal accountability and remedy for corporate violations of human rights;

(c) In the context of the post-2015 development agenda, reconsider development paradigms that do not lead to sustainable and inclusive development and poverty reduction amongst all groups, including indigenous peoples, and ensure that the agency of indigenous peoples as development actors is recognized in the reconceptualization of economic development.

79. **The Special Rapporteur recommends that the United Nations and related organizations:**

(a) Provide any required technical support to Member States on immediate reform to investment and free trade agreements, as well as broader, longer-term systemic reform;

(b) Ensure the mainstreaming of human rights standards, including all those relating to indigenous peoples, within all United Nations and related agencies that work on issues relating to investment and free trade agreements, including UNCTAD, the World Trade Organization and the World Bank;

(c) Contribute to the base of evidence on the impact of investment and free trade agreements on the rights of indigenous peoples through targeted consultation and research;

(d) Take a leading role in coordinating Government efforts to increase transparency and oversight related to international investment agreements;

(e) Develop tools and guidance that Member States can use to ensure that protection for the rights of indigenous peoples is included within all investment and free trade agreements.